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12 WESTERN AIR CHARTER, INC. dba JET EDGE

13 **UNITED STATES DISTRICT COURT**

14 **CENTRAL DISTRICT OF CALIFORNIA**

15
16 WESTERN AIR CHARTER, INC.,
17 doing business as JET EDGE
18 INTERNATIONAL, a California
19 corporation,

20 Plaintiff,

21 v.

22 PAUL SCHEMBARI, an individual;
23 ACP JET CHARTERS, INC., doing
24 business as PHENIX JET, a Florida
25 corporation; PHENIX JET
26 INTERNATIONAL, LLC, a Guam
27 Limited Liability Company, COSA DI
28 FAMIGLIA HOLDINGS, LLC, a
Guam Limited Liability Company, and
DOES 1-10, inclusive,

Defendants.

Case No.: 2:17-cv-00420-JGB (KSx)
Hon. Jesus G. Bernal

**OPPOSITION TO DEFENDANTS'
RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW**

[Declaration of Robert Estrin in
support filed concurrently herewith]

Hearing Date: June 17, 2019
Time: 9:00 a.m.
Judge: Hon. Jesus G. Bernal
Ctmm.: 1 (Riverside)

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1 **I. INTRODUCTION**

2 Defendants Paul Schembari (“Schembari”), Phenix Jet International, Inc.
 3 (“Phenix Jet”), ACP Jet Charters, Inc. (“ACP”), and Cosa di Famiglia Holdings, LLC
 4 (“CDF”) (collectively “Defendants”) employ a shotgun approach in a futile attempt to
 5 convince the Court to overturn the jury’s verdict. Defendants concede the jury returned
 6 the correct verdict in finding Schembari liable for breach of contract and breach of the
 7 duty of loyalty. Defendants only attack the jury’s findings on intentional interference
 8 with contractual relations and punitive damages. Defendants likely target these
 9 findings because the jury awarded most of the damages based on the intentional
 10 interference claim. Substantial evidence at trial, however, supports all the jury’s
 11 findings.

12 Defendants’ desperation to avoid paying the judgment is evidenced by the fact
 13 that Defendants have raised several new arguments in their Rule 50(b) motion. Despite
 14 having several opportunities to raise these arguments earlier (*e.g.*, motion to dismiss,
 15 summary judgment, and Rule 50(a) motion), Defendants failed to do so. Defendants’
 16 failure to raise these arguments in their Rule 50(a) motion prevents them from raising
 17 them in their Rule 50(b) motion.

18 The arguments Defendants did raise in their Rule 50(a) motion fail for the same
 19 reasons the Court previously rejected them. For example, Defendants argue that
 20 Plaintiff Western Air Charter, Inc. (“Plaintiff” or “Jet Edge”) did not introduce direct
 21 evidence regarding why Jet Edge’s customers terminated their contracts. Defendants’
 22 argument ignores that the jury could properly rely on the voluminous circumstantial
 23 evidence Plaintiff presented at trial to infer that Defendants’ interference was a
 24 substantial factor (meaning “more than a remote or trivial factor”) in causing Jet Edge’s
 25 clients to leave for Phenix Jet. Additionally, Defendants’ arguments about the jury’s
 26 punitive damages award fail because (1) Plaintiff introduced financial evidence
 27 sufficient for the jury to award punitive damages; and (2) Defendants failed to produce
 28 to Plaintiff the necessary financial information that the Court ordered them to produce.

1 In sum, the Court should reject all of Defendants’ arguments, new and old,
 2 because Defendants have not satisfied the difficult standard required for the Court to
 3 overturn the jury’s verdict.

4 **II. LEGAL STANDARD**

5 “Judgment as a matter of law (JMOL) after trial is proper when evidence permits
 6 only one reasonable conclusion and conclusion is contrary to that reached by the jury.”
 7 *Ostad v. Oregon Health Sciences University*, 327 F.3d 876, 881 (9th Cir. 2003). In
 8 ruling on a FRCP Rule 50(b) motion “the court must draw all reasonable inferences in
 9 favor of the nonmoving party, and it may not make credibility determinations or weigh
 10 the evidence.” *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000).
 11 *See also Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1242 (9th Cir. 2014)
 12 (“A jury’s verdict must be upheld if it is supported by substantial evidence that is
 13 adequate to support the jury’s findings, even if contrary findings are also possible”).

14 **III. ARGUMENT**

15 **A. The Court Should Not Alter the Jury’s Finding that Defendants Are** 16 **Liable for Intentional Interference with Contractual Relations.**

17 **1. The Court Should Reject Defendants’ First Argument as They** 18 **Did Not Raise it in Their Rule 50(a) Motion and It is Incorrect.**

19 Defendants argue that Plaintiff cannot prevail on its intentional interference
 20 claim by showing a disruption of the contracts between Plaintiff and its customers.
 21 (Motion (“Mot.”) at 3:15-4:13.) This argument contradicts California law which
 22 clearly holds that disruption of a contract constitutes intentional interference with
 23 contractual relations. Not only did Defendants fail to raise this argument in their Rule
 24 50(a) motion, but they cited to *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50
 25 Cal. 3d 1118, 1126 (1990) which contradicts Defendants’ position. Based on *Pacific*
 26 *Gas*, Defendants wrote in their Rule 50(a) motion that “intentional interference with
 27 contractual relations requires a plaintiff to establish, among other elements, that a
 28 defendant’s ‘intentional acts’ caused the ‘actual breach *or disruption*’ of a contractual

1 relationship between the plaintiff and some third party.” (Dkt No. 277-1 at 2:9-13)
 2 (emphasis added).

3 Furthermore, Defendants’ failure to raise this argument in their Rule 50(a)
 4 motion, prevents them from raising it now. “Because it is a renewed motion, a proper
 5 *post-verdict Rule 50(b) motion is limited to the grounds asserted in the pre-*
 6 *deliberation Rule 50(a) motion.* Thus, a party cannot properly ‘raise arguments in its
 7 post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise
 8 in its pre-verdict Rule 50(a) motion.’” *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d
 9 951, 961 (9th Cir. 2009) (emphasis added) (quotation omitted). “For the same reasons
 10 a party may not seek a JNOV on grounds not alleged in their motion for directed
 11 verdict, a district court may not enter a JNOV on grounds not asserted in a party’s
 12 motion for directed verdict.” *Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th
 13 Cir. 1990). Since Defendants failed to raise this argument in their Rule 50(a) motion
 14 and the law contradicts their argument, the Court should reject Defendants’ argument.¹

15 **2. The Court Should Reject Defendants’ Attempt to Ignore the**
 16 **Mountains of Evidence that the Jury Properly Relied on to Find**
 17 **Each Defendant Liable for Intentional Interference with**
 18 **Contractual Relations.**

19 **a. Plaintiff Presented the Jury with Sufficient Evidence to**
 20 **Determine that Each Defendant Intentionally Interfered**
 21 **with Plaintiff’s Contracts with its Customers.**

22 Defendants’ argument that the jury’s verdict was speculative boils down to their
 23 mistaken belief that Plaintiff could not prevail unless the customers testified at trial
 24 that they terminated their contracts with Jet Edge due to Defendants’ actions. Of
 25 course, this is not the law. Plaintiff presented the jury with extensive circumstantial
 26

27 ¹ Defendants believe the Court incorrectly instructed the jury on the elements of this
 28 claim. (Mot. at 4:1:13.) Defendants expand on the argument in their Rule 59 motion.
 Plaintiff explains why the instruction was proper in its Opposition to that motion.

1 evidence upon which the jury could rely on to easily find Defendants liable.

2 It is well settled law that it is proper for a jury to base its verdict on
3 circumstantial evidence. *See, e.g., E.E.O.C. v. Boeing Co.*, 577 F.3d 1044, 1050 (9th
4 Cir. 2009) (holding that circumstantial evidence can support a jury verdict); *Santos v.*
5 *Gates*, 287 F.3d 846, 852 (9th Cir. 2002) (holding that “a jury's finding . . . may
6 unquestionably rest on inferences drawn from circumstantial evidence”); *Brocade*
7 *Commc'ns Sys., Inc. v. A10 Networks, Inc.*, 2013 WL 831528, at *23 (N.D. Cal. Jan.
8 10, 2013) (affirming the jury’s verdict on intentional interference based on
9 circumstantial evidence). Indeed, the Court instructed the jury that the “law makes no
10 distinction between the weight to be given to either direct or circumstantial evidence.
11 It is for you to decide how much weight to give any evidence.” (Dkt. 296, Jury
12 Instruction No. 8.) Described below is just part of the evidence Plaintiff presented to
13 the jury, any piece of which the jury could have properly relied on to reach its verdict.

14 During his employment at Jet Edge, Schembari disparaged Jet Edge’s operations
15 to its customers.² (Declaration of Robert Estrin (“Estrin Decl.”), Exhs. A and B.) For
16 example, Schembari wrote: “[f]lights dispatched by JEI never go smoothly as there are
17 always mistakes, oversights, and lack of communication,” and, “[w]orking with JEI
18 ops is continually challenging . . .” (Estrin Decl., Exhs. A and B.) Schembari also
19 notified Jet Edge’s customers that they could still operate their aircraft if they left Jet
20 Edge “without any disruption.” (Estrin Decl., Exh. C.) Based on these emails alone,
21 a reasonable jury could find that Schembari intended to cause Jet Edge’s customers to
22 cancel their contracts and that these emails were a reason why the customers cancelled
23 their contracts. Schembari knew he was acting wrongfully because he asked client

24 _____
25 ² Hideto Shimooka was a representative for Jet Edge client Hideyuki Busujima. (Estrin
26 Decl., Exh. D at 80:7-15, 81:2-5, 81:22-24.) Yohei Sakurai was a Sojitz employee and,
27 in that capacity, a representative of each of the jet owners. (Estrin Decl., Exhs. D at
28 77:20-23, 79:5-10, 79:19-24; E at 10:25-11:6, 53:19-21, 74:8-11; F; G; H at 49:5-20,
68:24-70:2; and J at 23:23-25.) Schembari admitted at trial that “I was communicating
those words to a client representative, yes.” (Estrin Decl., Exh. D at 82:4-5).

1 representatives to “keep my comments between us, as I don’t want David to feel like
2 I am undermining him.” (Estrin Decl., Exh. A and Exh. E at 58:22-25.)

3 In footnote 3 of their Motion, Defendants tacitly admit that the communications
4 between Schembari and Shimooka provided the jury with evidence that Schembari
5 sought to interfere with Jet Edge’s contract with Hideyuki Busujima. However,
6 Defendants fail to realize that Yohei Sakurai (“Sakurai”) was also included on these
7 disparaging emails. (Estrin Decl., Exhs. A and B.) Sakurai was a representative of
8 Sojitz. (Estrin Decl., Exh. D at 23:4-9, 77:20-23, 79:8-10.) Schembari admitted
9 “[t]hese Japanese customers that I flew for, they were all represented by the Sojitz
10 Corporation.” (Estrin Decl., Exh. D at 25:8-9.) Schembari also admitted Sakurai
11 communicated with the customers on Schembari’s behalf. (Estrin Decl., Exh. D at
12 24:3-21.) Therefore, the jury reasonably inferred that Schembari intended for his
13 disparaging comments to reach the ears of Jet Edge’s customers through Sakurai. The
14 fact that Sakurai assisted Schembari in creating Phenix Jet and is currently its COO
15 supports this inference. (Estrin Decl., Exhs. J at 35:2-7, 12-17, 65:14-20; O; P.)

16 Furthermore, Plaintiff presented the jury with a detailed roadmap of the steps
17 Schembari took to create Phenix Jet (all while still employed by Jet Edge) with the
18 intent of inducing Jet Edge’s customers to switch to Phenix Jet:

- 19 • Yohei Sakurai, Elsie Quenga, and Schembari devised YEP with the intent to
20 acquire a Part 135 AOC even though Jet Edge already had one. (Estrin Decl.,
21 Exh. E at 70:11-71:4 and Exh. K.)
- 22 • Phenix Jet sought a bank loan. (Estrin Decl., Exh. E at 75:19-22 and Exh. L.)
- 23 • Schembari formed a partnership with Sojitz to take Jet Edge’s customers to
24 Phenix Jet. (Estrin Decl., Exhs. D at 66:13-21, M, and N.)
- 25 • Rodney Webb, Elsie Quenga, Yohei Sakurai, and Schembari worked to
26 create a business plan for Phenix Jet to compete with Jet Edge. (Estrin Decl.,
27 Exhs. D at 64:9-19, 66:13-21, 68:2-7; E at 76:8-77:3, 78:8-10; and N.)
- 28 • Defendants created financial projections based on jets under Jet Edge

1 management that eventually moved to Phenix Jet. (Estrin Decl., Exhs. E at
2 85:4-86:1, 86:6-13, 86:20-23, 87:6-17; and O.)

- 3 • CDF, Schembari's wholly owned company, secretly entered into a Broker
4 Agreement to receive payment if it acquired a Part 135 AOC for Phenix Jet
5 to manage jets. (Estrin Decl., Exhs. E at 99:13-18, 100:4-14; and P.)
- 6 • Schembari negotiated a Letter of Intent ("LOI") for CDF to acquire ACP, the
7 AOC-holding company that, together with Phenix Jet, stole Jet Edge's
8 customers. (Estrin Decl., Exhs. D at 71:16-20, 75:16-19, 76:11-19, 79:19-
9 24; Q and R.) Schembari admitted he negotiated the LOI "as the managing
10 member of Cosa Di Famiglia Holdings." (Estrin Decl., Exh. D at 79:5-7.)
- 11 • Schembari diverted the aircraft N2020 away from Jet Edge management so
12 that it would end up under the management of his company Phenix Jet/ACP.
13 (Estrin Decl., Exhs. E at 102:14-22, 104:2-10; and W.) Schembari admitted
14 at trial that he fully intended for Phenix Jet/ACP to manage N2020 and this
15 occurred. (Estrin Decl., Exhs. D at 72:5-6, 72:12-21, 73:25-74:2 and Q.)

16 Additionally, the testimony of Jet Edge CEO Bill Papariella ("Papariella"),
17 David Erich, Ed Frank, Yohei Sakurai, Rodney Webb, and Bob Seidel constituted
18 substantial evidence for the jury to conclude that Defendants acted intentionally to
19 disrupt Jet Edge's contracts and was a substantial factor in causing that disruption.³

20 A convincing piece of evidence that Defendants' interference caused Plaintiffs
21 harm is that all five customers terminated their contracts with Jet Edge and signed

22
23 ³ Jet Edge introduced testimony of Papariella, Erich, and Frank that Jet Edge's clients
24 rarely switch to a competitor, especially without notice, supporting the jury's verdict
25 that Defendants' interference was a substantial factor in the customers leaving for
26 Phenix Jet. (Estrin Decl., Exhs. H at 62:24-63:7; I at 16:18-17:17; S at 20:21-25, 22:3-
27 23:3, 26:8-17.) Jet Edge's industry expert Matthew Winer testified that there are
28 several factors that make it very difficult for jet owners to change management
companies, including the cost of doing so. (Estrin Decl., Exh. S at 53:2-55:3, 55:13-
16, 56:17-57:8.) *See also* Estrin Decl., Exhs. H at 57:1-25; I at 14:15-22, 18:19-25,
46:9-47:5, 69:2-19; J at 193:25-194:14; and T at 72:8-23, 80:6-81:25.)

1 contracts with ACP dba Phenix Jet. (Estrin Decl., Exhs. DD, GG, HH, II, JJ, KK, LL,
2 MM, and NN.) Schembari's testimony confirmed that Defendants successfully
3 executed their plan to take Jet Edge's customers:

4 Q. Those revenue projections for your competing company were
5 based on revenue that you would generate from the jets . . . that
6 were then under contract with Jet Edge; isn't that true, sir?

7 A. Yes. Those projections were based on aircraft that was currently
8 being managed by Jet Edge.

9 Q. That's, in fact, what happened? You created a partnership with
10 Sojitz, correct?

11 A. That did occur.

12 Q. And you created Phenix Jet, correct?

13 A. Yes, I did.

14 Q. Every single one of those jet owners that were represented by
15 Sojitz cancelled their contracts with Jet Edge, correct?

16 A. That did happen, yes.

17 Q. And they all signed contracts with Phenix Jet?

18 A. That's also true, yes, ma'am.

19 (Estrin Decl., Exhs. D at 68:2-17, M, N, O, P, and Z.)

20 Based on this testimony alone, a jury could reasonably conclude that the five
21 customers left Jet Edge for Phenix Jet because of Defendants' intentional interference.
22 Defendants had the ability to rebut Jet Edge's evidence that the customers terminated
23 their contacts with Jet Edge because of Defendants' interference, but they failed to
24 offer any alternative explanation why the customers left Jet Edge. Defendants had
25 access to these customers but failed to produce them as witnesses at trial or submit
26 their declarations in support of any motion. "[T]he production of weaker evidence,
27 when stronger might have been produced, lays the producer open to the suspicion that
28 the stronger evidence would have been to his prejudice." *Hung You Hong v. United*

1 *States*, 68 F.2d 67, 69 (9th Cir. 1933).

2 Defendants cannot obtain judgment as a matter of law unless the evidence
3 permits only one reasonable conclusion. Based on the evidence presented at trial, it
4 was reasonable for the jury to find Defendants' liable for intentional interference.

5 **b. The Court Should Reject Defendants' New Argument**
6 **that Only Defendants' Actions after Schembari Left Jet**
7 **Edge Are Relevant.**

8 Confronted with the overwhelming evidence of Defendants' intentional
9 interference while Schembari was still employed by Jet Edge, Defendants speciously
10 claim that the jury should have ignored all this evidence. The Court should reject
11 Defendants' argument for at least three reasons.

12 First, Defendants failed to raise this argument in their Rule 50(a) motion or at
13 any time prior to the jury's verdict. Defendants had several opportunities to raise this
14 legal argument, including at summary judgment, in a motion in limine, or in their Rule
15 50(a) motion. They failed to do so and cannot do so here. "Because it is a renewed
16 motion, a proper post-verdict Rule 50(b) motion is limited to the grounds asserted in
17 the pre-deliberation Rule 50(a) motion." *E.E.O.C.*, 577 F.3d at 961.

18 Second, Defendants' argument is solely based on a distorted view of a single
19 statement made by Plaintiff's counsel during closing argument. (Mot. at 4:22-25.)
20 Counsel's statement during closing argument is not evidence, and a Rule 50(b) motion
21 challenges the sufficiency of the evidence. *Ostad*, 327 F.3d at 881. The Court properly
22 instructed the jury that "[a]rguments and statements by lawyers are not evidence."
23 (Dkt. No. 296, Jury Instruction No. 7.) Defendants cite no authority to support their
24 contention that counsel's statement during closing argument prevents the jury from
25 considering the evidence it heard about Defendants' intentional interference during
26 Schembari's employment with Jet Edge. Defendants cannot draw an arbitrary line in
27 the sand on the date Schembari resigned and preclude the jury from considering the
28 evidence regarding Defendants' interference before Schembari's resignation.

1 Third, even if Plaintiff could only rely on Defendants’ conduct after Schembari
2 resigned, the jury still had sufficient evidence to find Defendants liable. Defendants
3 mistakenly argue that any conduct they took after Schembari resigned was permissible
4 competition. However, the competition privilege does not apply to interference with
5 contractual relations claims. *See, e.g., UMG Recordings, Inc. v. Glob. Eagle Entm’t,*
6 *Inc.*, 2015 WL 12746208 at *21 (C.D. Cal. Oct. 30, 2015) (“California courts have
7 applied the competition privilege only to interference with prospective advantage
8 claims, not intentional interference with contractual relations claims”). Defendants’
9 cases are inapposite. Both *The Ret. Grp. v. Galante*, 176 Cal. App. 4th 1226 (2009)
10 and *Am. Credit Indem. Co. v. Sacks*, 213 Cal. App. 3d 622 (1989) are about trade secret
11 misappropriation, not interference with contractual relations.

12 Moreover, the competition privilege only applies when there is “no evidence that
13 the competitor . . . engaged in any wrongful or illegitimate conduct.” *I-CA Enterprises,*
14 *Inc. v. Palram Americas, Inc.*, 235 Cal. App. 4th 257, 293 (2015). In *I-CA Enterprises,*
15 *Inc.*, the Court of Appeals affirmed the jury’s verdict for plaintiff on its intentional
16 interference claim because the defendant importer and manufacturer secretly discussed
17 working together, the manufacturer exercised the termination provision of its contract,
18 and the defendant and manufacturer made up a story that the plaintiff did not achieve
19 its sales goals. *I-CA Enterprises, Inc.*, 235 Cal. App. 4th at 290, 293. The Court of
20 Appeals rejected defendant’s fair competition argument, holding that “the jury was
21 entitled to infer that [the buyer] engaged in intentional acts designed to disrupt the
22 relationship between [the importer] and [the manufacturer]—and in fact, successfully
23 carried out such a disruption.” *Id.* at 291. *See also Oliver & Tate Enterprises Inc. v.*
24 *Found. Worldwide Inc.*, 2014 WL 12595334 at *7 (C.D. Cal. Mar. 21, 2014) (denying
25 summary judgment on intentional interference with contract claim based on
26 defendant’s emails to plaintiff’s customer that plaintiff’s product was unsafe).

27 Like *I-CA Enterprises, Inc.* and *Oliver & Tate Enterprises Inc.*, there was ample
28 evidence for the jury to infer that Defendants engaged in wrongful conduct after

1 Schembari resigned. As just a few examples of wrongful competition after Schembari
2 resigned, Defendants copied Jet Edge's Aircraft Charter Management Agreements
3 ("ACMAs") nearly verbatim to lure Jet Edge's customers and stole Jet Edge's Initial
4 Operating Experience ("IOE") training documents. (Estrin Decl., Exhs. CC; DD; EE;
5 and FF.) Defendants also purchased ACP so Phenix Jet could steal Jet Edge's
6 customers, and lied to Jet Edge's CEO about why Pocket Corporation terminated its
7 contract with Jet Edge. (Estrin Decl. Exhs. E at 120:25-121:3; F; X; Y; DD; GG; II;
8 JJ; KK; and MM.) These wrongful actions, along with others, culminated in the
9 customers leaving Jet Edge for Defendants' competing business.

10 **c. The Entity Defendants Cannot Escape Liability.**

11 The entity Defendants raise a new meritless argument to shield themselves from
12 the actions of their founder and owner Schembari. However, the jury had substantial
13 evidence to find the entity Defendants liable for intentional interference as well as
14 Schembari. Defendants argue that because Schembari incorporated Phenix Jet the day
15 he resigned that Phenix Jet cannot be held liable for any actions Schembari took before
16 that date. Such a loophole would lead to an injustice, especially if the entity Defendants
17 are the only ones who can pay the judgment.

18 Once again, Defendants cannot raise this new argument in a Rule 50(a) motion.
19 Defendants had many opportunities to raise this argument before forcing the Court,
20 jury, and the parties to incur the time and expense of trial, but they failed to do so.
21 Defendants' failure to raise this argument earlier bars them from raising it here. "[A]
22 proper post-verdict Rule 50(b) motion is limited to the grounds asserted in the pre-
23 deliberation Rule 50(a) motion." *E.E.O.C.*, 577 F.3d at 961.

24 Additionally, the evidence cited in Section III(A)(2)(a) entitled the jury to find
25 the entity Defendants liable. With the assistance of Sakurai and Elsie Quenga
26 ("Quenga") (respectively the COO and General Manager of Phenix Jet/ACP⁴)

27 _____
28 ⁴ Yohei Sakurai testified that he is the COO of Phenix Jet and ACP, which are "one

1 Schembari created the entity Defendants with the sole purpose for Defendants to steal
2 Jet Edge's clients. Although Schembari did not incorporate Phenix Jet until the day he
3 resigned, Schembari represented himself to others as a Phenix Jet representative.⁵ For
4 example, during the winter of 2016, Schembari negotiated on behalf of CDF to
5 purchase ACP, an AOC certificate that Phenix Jet needed to manage Jet Edge's planes.
6 Schembari admitted that the purpose of these communications was to compete with Jet
7 Edge through Phenix Jet/ACP. (Estrin Decl., Exh. E at 109:1-6.) On March 10, 2016,
8 Schembari wrote to Bob Seidel that "our aircraft are currently under management at
9 another company," which Schembari admitted meant Jet Edge. (Estrin Decl., Exhs. E
10 at 109:1-18, 109:22-110:1; and Z.) Schembari's use of the word "our" shows this was
11 not just Schembari acting in a vacuum, but instead on behalf of the entity Defendants.

12 Not only did Schembari, Quenga, and Sakurai ensure Phenix Jet was prepared
13 to steal Jet Edge's customers, but Schembari explicitly held himself out as working for
14 Phenix Jet by developing logo designs, obtaining office space, setting up a website,
15 and obtaining quotes from software and office suppliers. (Estrin Decl., Exhs. E at
16 79:17-80:6, 81:1-10; AA and BB.) Also, as described above, Schembari diverted
17 N2020 from Jet Edge to ensure it was managed by Phenix Jet/ACP. (Estrin Decl.,
18 Exhs. D at 72:5-6, 72:12-21, 73:25-74:2; E at 102:14-22, 104:2-10; Q and W.)

19 Furthermore, Phenix Jet was a mere continuation of YEP – a company
20 Schembari devised nearly a year before his resignation from Jet Edge. Along with
21 Sakurai and Quenga, Schembari planned the creation of YEP, a global aircraft
22 operations company, with the intent to acquire a 135 certificate even though Jet Edge
23 already had one. (Estrin Decl., Exhs. E at 70:11-71:4 and K.) Sakurai and Quenga are

24 _____
25 and the same company." (Estrin Decl., Exh. J at 65:14-20.)

26 ⁵ Schembari, on behalf of his company CDF, signed the Articles of Organization for
27 Phenix Jet on March 14, 2016, while still employed by Jet Edge. (Estrin Decl., Exh.
28 U at 144-5.) At trial, Schembari attempted to hide this fact, testifying that "maybe the
notary had the date wrong." (Estrin Decl., Exh. D at 86:20-22.)

1 now the COO and General Manager of Phenix Jet. (Estrin Decl., Exh. E at 67:7-68:8.)
2 On behalf of YEP/Phenix Jet, Schembari, Sakurai, and Quenga (1) purchased an AOC
3 to compete with Jet Edge; (2) created a business plan for Phenix Jet containing financial
4 projections based on Jet Edge customers; and (3) copied Jet Edge's confidential
5 information to operate Phenix Jet, including Jet Edge's employee handbook and
6 ACMA's. (Estrin Decl. Exhs. D at 66:13-21, 68:2-17; E at 89:11-21, 99:13-18, 100:4-
7 14, 106:16-18, 106:21-22, 108:6-8; M; N; O; P; V; X; and Y.)

8 This evidence (which is just a sample of the evidence the jury heard) shows that
9 Schembari created and operated Phenix Jet while employed by Jet Edge. The fact
10 Schembari waited until the day he resigned from Jet Edge to sign Phenix Jet's Articles
11 of Incorporation should not absolve Phenix Jet/ACP from liability. If this were the
12 law, an individual could commit all the tortious acts he or she wanted, then create a
13 company which made all the profits from the tortious acts, and not pay any damages
14 to the plaintiff because the company – not the individual – had the money to pay the
15 judgment. Such a result is contrary to the purpose of the judicial system whose goal
16 is to provide justice and fairness to those aggrieved. *See, e.g., Cone v. W. Virginia*
17 *Pulp & Paper Co.*, 330 U.S. 212, 215 (1947) (holding that the trial court is required to
18 exercise its discretion under Rule 50(b) to “serve the ends of justice”).

19 Moreover, the entity Defendants engaged in improper interference after Phenix
20 Jet's incorporation. Defendants copied Jet Edge's ACMA's nearly verbatim to lure Jet
21 Edge's customers. (Estrin Decl., Exhs. CC and DD.) Additionally, in August 2016,
22 Defendants stole Jet Edge's IOE training documents which Defendants needed to
23 operate their competing business. Schembari admitted that these documents were
24 “copied [and] rebranded with Phenix Jet branding.” (Estrin Decl. Exhs. E at 120:25-
25 121:3; EE and FF.) Additionally, on March 15, 2016 (after Phenix Jet's incorporation)
26 Schembari, on behalf of CDF, signed the LOI to acquire ACP so that Phenix Jet could
27 steal Jet Edge's customers. (Estrin Decl., Exh. D at 75:20-22.)

28 Importantly, the Jet Edge customers all gave their termination notices to Jet Edge

1 after the incorporation of Phenix Jet on March 14, 2016. (Estrin Decl., Exhs. GG, II,
2 JJ, KK, and MM.) Thus, Phenix Jet was incorporated by the time the most important
3 actions in this case occurred – the departure of Jet Edge’s customers for Phenix Jet.
4 The jury therefore had substantial evidence to conclude that Phenix Jet, or one of its
5 officers or employees, said something to these Jet Edge customers after Phenix Jet’s
6 incorporation that resulted in Jet Edge’s customers terminating their contracts with Jet
7 Edge and moving to Phenix Jet. Any actions by Schembari, Sakurai, or Quenga are
8 imputed to Phenix Jet, thus making Phenix Jet liable. “Principals are liable for the torts
9 of their agents committed within the scope of their agency.” *Holley v. Crank*, 400 F.3d
10 667, 673 (9th Cir. 2005). This doctrine applies even if the agent acts solely to benefit
11 himself, so long as the agent acts with “apparent authority.” *American Soc. of*
12 *Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 566 (1982).

13 The jury had substantial evidence to find all Defendants liable for intentional
14 interference based either on the actions of their founders before Phenix Jet’s
15 incorporation or on Defendants’ actions after Phenix Jet’s incorporation.⁶

16 **B. The Court Should Uphold the Jury’s Finding that Defendants Acted**
17 **with Malice, Oppression or Fraud Warranting Punitive Damages.**

18 **1. This Court Correctly Held that Plaintiff Introduced Sufficient**
19 **Financial Evidence for the Jury to Award Punitive Damages.**

20 **a. California Law Supports an Award of Punitive Damages**
21 **Based Solely on Financial Evidence Showing Defendants’**
22 **Profits Resulting from Their Tortious Acts.**

23 Plaintiff introduced at trial the most important financial information regarding
24 the Defendants – the amount of profits they would make from their tortious acts.

25 _____
26 ⁶ Defendants concede that Schembari created his wholly owned company CDF, while
27 employed by Jet Edge and that CDF engaged in “blameworthy” conduct by obtaining
28 payment for brokering the deal for the Part 135 AOC held by ACP that Phenix Jet used
to manage Jet Edge’s former customers. (Mot. at 5:26-6:1.) While CDF engaged in
other blameworthy conduct, this fact alone supports the jury’s verdict against CDF.

1 (Estrin Decl., Exhs. O, PP, and QQ.) On January 23, 2019, the Court rejected
2 Defendants' argument that Plaintiff did not put on evidence of Defendants' financial
3 condition reasoning that "there is evidence of the financial conditions, at least, you
4 know, regarding the plan or the projected profits of the planes. So, you know, there is
5 some basis from which the jury could find what the general financial condition is of
6 Phenix Jet" (Estrin Decl., Exh. OO at 15:19-23.) As discussed below, California
7 law supports the Court's decision to deny Defendants' Rule 50(a) motion. The Court
8 should once again reject Defendants' argument and deny their Rule 50(b) motion.

9 California courts have explicitly recognized a defendant's ill-gotten profits as
10 an appropriate measure of punitive damages, even after the decision that Defendants
11 rely on so heavily, *Adams v. Murakami*, 54 Cal. 3d 105, 112 (1991) ("*Adams*"). In
12 *Cummings v. Medical Corp. v. Occupational Medical Corp.*, 10 Cal. App. 4th 1291,
13 1298 (1992) (post-dating *Adams*) the Court of Appeals held that "where the defendant
14 has been guilty of fraud, punitive damages may properly be based on evidence of the
15 profitability of defendant's misconduct." The Court of Appeals reasoned that "[t]he
16 defendant's profits from misconduct are objectively based and uniquely appropriate as
17 the basis for punitive damages." *Id* at 1299. *See also Commercial Union Ins.*
18 *Companies v. Greene*, 1998 WL 1661425 at *5 (C.D. Cal. Sept. 25, 1998) (affirming
19 award of punitive damages because "courts may base punitive damages on evidence
20 of the defendant's profitability from the fraud"); *Carelli v. Matthew Scott, Gelsco, Inc.*,
21 2010 WL 11597288 at *9 (C.D. Cal. June 24, 2010) (awarding punitive damages based
22 on ill-gotten profits).

23 These three cases do not contradict the holding of *Adams*, as *Adams* provided a
24 flexible approach for what evidence is sufficient to show a defendant's ability to pay a
25 punitive damages award. The California Supreme Court in *Adams* even recognized
26 that the Association for California Tort Reform advocated "the profitability of the
27 defendant's misconduct as the proper measure." *Adams*, 54 Cal. 3d at 116, fn. 7.

28 Defendants rely on *Kenly v. Ukegawa*, 16 Cal. App. 4th 49 (1993). *Kenly* does

1 not overturn *Cummings*. The court in *Kenly* held that defendant's liabilities should be
2 presented to the jury to ensure a defendant can pay a punitive damages award. *Id.* at
3 57. This logic does not achieve the purpose of punitive damages. A defendant
4 subsidiary may pass ill-gotten profits to its parent or distribute them to shareholders.
5 Defendants' refusal to produce documents showing their income streams to Plaintiff
6 supports an inference that this may have happened in this case. By focusing on a
7 defendant's liabilities, the *Kenly* court effectively gave tortfeasors a license to steal
8 without fear of punitive damages. All a defendant needs to do is move ill-gotten gains
9 out of the company in a legal manner. Even reinvesting the ill-gotten gains into the
10 company will create debts that a defendant can claim prevent it from paying a
11 judgment. The law should not, and does not, condone such behavior.

12 **b. Evidence of Defendants' Ill-Gotten Profits is the Best**
13 **Financial Evidence to Determine the Proper Amount of**
14 **Punitive Damages to Award Against Defendants.**

15 This case is particularly suitable for basing punitive damages on Defendants'
16 improper gains because Defendants' business is in its infancy. California law
17 recognizes that relying on the net worth of a company is not always the best measure
18 for punitive damages because "net worth is probably one of the least reliable financial
19 metrics or statistics you can use, because there are a number of financial or accounting
20 transactions in which a company can engage to lower its net worth while remaining
21 profitable." *Bankhead v. ArvinMeritor, Inc.*, 205 Cal, App. 4th 68, 854 (2012). Net
22 worth is especially unreliable in the case of a new company like Phenix Jet – a company
23 that was built on the theft of Jet Edge's customers. Since Phenix Jet has recently begun
24 operations, it likely has incurred a lot of start-up costs and will increase its profits in
25 the future. Defendants' current net worth is a far cry from where it will likely be in 5
26 years. Therefore, a punitive damages award based on Defendants' current net worth
27 does not achieve the goal of deterring improper behavior because Defendants will earn
28 profits from the planes they stole from Plaintiff for years to come. These amounts are

1 not reflected in Defendants' current net worth. Thus, it is more appropriate to rely on
2 Defendants' improper gains to determine punitive damages than Defendants' current
3 net worth.

4 Supporting Plaintiff's position, the court in *Rufo v. Simpson*, 86 Cal. App. 4th
5 573 (2001) held that a jury can rely on future income streams to determine punitive
6 damages. In *Rufo*, the jury awarded \$8.5 million in compensatory damages and \$25
7 million in punitive damages. *Id.* at 581. On appeal, defendant argued the punitive
8 damages award was improper because it exceeded defendant's \$7 million net worth.
9 *Id.* at 618-19. The Court of Appeals rejected defendant's argument that the punitive
10 damages exceeded his net worth reasoning that defendant's future income was relevant
11 to "whether the damages will ruin him or be absorbed by him." *Id.* at 622, 625.
12 Similarly, Defendants' future income from the stolen jets was appropriate for the jury
13 to rely upon in determining the punitive damages award.

14 Defendants argue Plaintiff should not be permitted to use Defendants'
15 projections because "business plans are notoriously rosy." (Mot. at 9:25.) This is not
16 the true here. Defendants created their projections with the help of Sojitz, who
17 represented the customers Defendants stole. (Estrin Decl., Exhs. E at 81:23-82:8,
18 82:20-83:3, 85:4-86:1, 86:20-23, 87:6-17; and O.) Thus, Sojitz knew how much these
19 customers would pay Defendants to manage and charter their jets. Sojitz also had
20 information about Jet Edge's profits and costs which it could use to accurately create
21 the financial projections. Thus, Defendants' projections were not "rosy," but accurate.

22 Evidencing this point, Phenix Jet's financial projections show that it intended to
23 make a profit of nearly \$2.5 million from the stolen jets in 2017. (Estrin Decl., Exh. O
24 at PHX006425.) Phenix Jet's 2017 financial statement shows approximately \$2.5
25 million in profits for 2017. (Estrin Decl., Exh. ZZ at PHX042752.) The accuracy of
26 Phenix Jet's projections provides more support that it was proper for the jury to base
27 punitive damages on Phenix Jet's profits from the stolen jets. Phenix Jet refused to
28 produce its 2018 income statement despite Plaintiff's request that it do so, perhaps

1 because profits had increased for 2018 and Phenix Jet did not want the jury to see the
2 increased profits when determining compensatory and punitive damages. In sum,
3 Phenix Jet’s projected profits from the stolen jets (which nearly match its actual profits)
4 constitute reliable information on which the jury could properly base its punitive
5 damages award under *Cummings*, *Commercial Union Ins. Companies*, and *Carelli*.

6 **c. Caselaw Does Not Support Defendants’ Argument that**
7 **the Jury Cannot Award Punitive and Compensatory**
8 **Damages Exceeding Defendants’ Ill-Gotten Profits.**

9 Defendants’ argument that *Cummings* supports a reduction in the jury’s punitive
10 damages award is meritless. The court in *Cummings* reasoned that “[o]f course a gain-
11 based measure of punitive damages may not always adequately serve the deterrent
12 function.” *Cummings* at 1300. The court explained, “[b]ut even taking away the
13 defendant’s ill-gotten gains may sometimes not be enough to deter similar conduct, it
14 is never too much.” *Ibid*. Clearly, the court in *Cummings* did not view ill-gotten gains
15 as a cap on punitive damages and compensatory damages combined. Instead, it
16 reasoned it was a floor. This must be the law because if a plaintiff could not recover
17 more than the defendant’s ill-gotten gains then the defendant would not be deterred
18 from wrongful behavior since it could only lose what it improperly gained.

19 The court’s award of punitive damages in *Commercial Union Ins. Companies*,
20 1998 WL 1661425 at *6 confirms this is the law. The court reasoned that the ill-gotten
21 gains amounted to approximately \$200,000 and awarded over \$247,000 in
22 compensatory damages and \$200,000 in punitive damages. *Id.* at *1, *6. This award
23 of \$447,000 far exceeded the ill-gotten gains of \$200,000. *Ibid*. Similarly, in *Carelli*,
24 2010 WL 11597288 at *9, the court held that the defendant’s fraudulent scheme cost
25 the plaintiffs approximately \$2.5 million. The court awarded plaintiffs \$2.5 million in
26 compensatory damages and an additional \$2 million in punitive damages. Again, the
27 combined award of \$4.5 million far exceeded the ill-gotten gains of \$2.5 million. Thus,
28 Defendants’ argument on pages 10:23-11:13 of their motion is contrary to law.

**2. Defendants Cannot Complain about the Financial Evidence
Presented at Trial Due to Their Deficient Productions.**

**a. Defendants Prevented Plaintiff from Presenting the Jury
with a Full Picture of Defendants' Current Finances.**

The Court should not accept the excuses offered by Defendants for their failure to produce adequate financial information. On June 8, 2017, Plaintiff requested that Defendants produce financial documents. (Estrin Decl., Exh. RR at RFP No. 61.) Over a year later, Defendants produced a few 2017 financial statements. (Mot. at 11:22-24.) Recognizing that Defendants would not have 2018 financial statements until the end of 2018, Plaintiff waited to request updated financial statements. On December 13, 2018, Plaintiff asked Defendants to produce updated financial statements, including an update to Phenix Jet's 2017 consolidated financial statement. (Estrin Decl., Exh. SS.) Despite having an obligation to update their document production under the FRCP, Defendants refused to do so. (Estrin Decl., Exh. TT.) *See, e.g., Sanchez v. California*, 2015 WL 2185186 at *13 (E.D. Cal. May 8, 2015) ("Further Plaintiff indicated that she is not required to supplement discovery since we are within thirty days of trial in this action. However, Rule 26(e) provides a continuing duty to supplement or correct discovery responses").

Due to Defendants' refusal to produce financial records, Plaintiff served trial subpoenas on each Defendant. (Estrin Decl., Exh. UU.) Each Defendant objected to producing any documents claiming the trial subpoenas were untimely. (Estrin Decl., Exh. VV.) At the January 7, 2019, pre-trial conference, the Court rejected Defendants' argument and ordered them to comply with the trial subpoenas stating, "I do think that they have a right to know something about the present financial condition of the defendant" (Estrin Decl., Exh. WW at 28:5-7.) Later that day, the parties exchanged e-mails concerning financial documents. (Estrin Decl., Exh. XX.) Plaintiff generously narrowed the scope of its trial subpoenas recognizing the lack of time Defendants had to produce documents before trial. However, Plaintiff still needed (and

1 requested) documents showing the current financial status of the Defendants, including
2 Schembari. (*Id.*) Despite the Court’s order that Defendants produce current financial
3 information, Defendants produced only two pages. (Estrin Decl., Exhs. DDD and
4 EEE.) Plaintiff sent an e-mail to confirm what Defendants had produced and asking
5 again when it would receive Schembari’s financial information. (Estrin Decl., Exh.
6 YY.) Defendants did not agree to produce any of Schembari’s financial records.
7 (Estrin Decl., ¶ 53.) It is implausible that Schembari had no documents evidencing his
8 net worth as Defendants’ counsel claimed. (Estrin Decl., Exh. XX.) Defendants also
9 never produced an update to Phenix Jet’s 2017 consolidated financial statement which
10 Plaintiff requested on December 13, 2018. (Estrin Decl., Exhs. SS, XX, and Estrin
11 Decl., ¶ 54.) In sum, Defendants did not produce any financial information concerning
12 Schembari, any 2018 financial information concerning ACP, or an update to Phenix
13 Jet’s 2017 consolidated financial statement. (Estrin Decl., ¶¶ 53-54.)

14 Defendants put Plaintiff in an impossible position with regard to introducing
15 Defendants’ financial information. Defendants only provided Plaintiff with one-page
16 balance sheets for Phenix Jet and CDF. (Estrin Decl., Exhs. DDD and EEE.) Since
17 Defendants did not produce 2018 financial information for ACP or *any* of Schembari’s
18 financial information Plaintiff could only show the jury part of Defendants’ financial
19 condition. All the Defendants are interconnected, so the money they earned could be
20 held by any of them. (Estrin Decl., Exhs. U and BBB.) This is why Plaintiff’s trial
21 subpoenas sought documents showing how money was distributed and divided
22 between the Defendants and requested Phenix Jet’s updated financial statement.

23 Defendants should not benefit from their refusal to produce documents showing
24 their present financial condition. Indeed, the Court of Appeals in *Green v. Laibco,*
25 *LLC*, 192 Cal. App. 4th 441, 453 (2011), rejected a defendant’s argument that the jury
26 did not have enough evidence about defendant’s net worth as “*the height of absurdity*”
27 because defendant’s stonewalling caused the lack of financial evidence. The defendant
28 in *Green* failed to produce current financial statements, instead producing balance

1 sheets and profit and loss statements, which defendant's CEO struggled to read. *Id.* at
2 454. Due to defendant's conduct, and because there was some financial evidence
3 admitted, the Court of Appeals directed the trial court to affirm the jury's award of
4 punitive damages. *Id.* at 456.

5 In *StreetScenes v. ITC Entertainment Group, Inc.*, 103 Cal. App. 4th 233 (2002),
6 the court also prevented the tactic that Defendants try to employ here. In *StreetScenes*,
7 the plaintiff served notices to appear on defendants requesting financial records. *Id.* at
8 241. In response to a court order, Defendants only brought two unaudited income
9 statements to court. *Ibid.* The court marked the documents next in order, and the jury
10 awarded punitive damages. *Ibid.* On appeal, defendants argued plaintiff failed to carry
11 its burden to prove defendants net worth under *Adams*. The Court of Appeals upheld
12 the trial court's decision to permit the jury to award punitive damages. *Id.* at 244. The
13 appellate court reasoned that due to defendant's failure to produce documents, it was
14 "in no position to complain." *Id.* at 243. *See also Fernandes v. Singh*, 16 Cal. App.
15 5th 932, 942 (2017) ("A number of cases have held that noncompliance with court
16 order to disclose financial condition precludes a defendant from challenging the
17 sufficiency of the evidence of a punitive damages award on appeal").

18 The Court of Appeals in *Mike Davidov Co. v. Issod*, 78 Cal. App. 4th 597, 610
19 (2000) came to the same conclusion. The Court of Appeals rejected defendant's
20 argument that the court should vacate a punitive damages award since the plaintiff had
21 not presented sufficient evidence of defendant's financial condition due to the fact the
22 defendant had failed to produce sufficient documentation of its financial condition.
23 The Court of Appeals affirmed the punitive damages award reasoning that it did not
24 matter that the plaintiff failed to (1) conduct pretrial discovery of financial information;
25 (2) subpoena documents or witnesses at trial; or (3) bifurcate liability from damages.
26 *Id.* at 608. The Court should follow the holding of *Mike Davidov Co.*, (as well as the
27 holdings in *Green* and *StreetScenes*) especially since Plaintiff requested Defendants'
28 financial records in pretrial discovery and again through trial subpoenas.

b. Because Defendants’ 2017 Financial Information Was Outdated It Would Not Have Been Proper for the Jury to Rely Upon it in Deciding Punitive Damages.

Defendants give the impression that they provided Plaintiff with a plethora of financial information to tell the jury about. The financial information provided was out of date except for two pages representing the balance sheets for Phenix Jet and CDF. Yet in their Rule 50(b) motion, Defendants emphasize Phenix Jet’s 2017 consolidated financial statement as evidence Plaintiff should have introduced at trial. As the Court noted, Plaintiff needed to know “about the *present* financial condition” of the Defendants. (Estrin Decl., Exh. WW at 28:5-7.) Accordingly, as discussed above, Plaintiff repeatedly asked for an update to Phenix Jet’s consolidated financial statement. Defendants refused to provide this update even after the Court’s order.

The financial condition of Defendants in 2017 is irrelevant to the issue of punitive damages in a trial commencing in 2019. This is especially true since 2017 was Phenix Jet’s first year of operation so their 2018 financial condition would likely be better than their 2017 financial condition. The documents support this statement. For example, as of March 2017, Phenix Jet had a net worth of \$321,000. (Estrin Decl., Exh. AAA.) By September 2018, Phenix Jet’s net worth had grown to \$2.6 million. (Estrin Decl., Exh. DDD.) Defendants refusal to produce 2018 financial documents supports the notion that Defendants wanted to force Plaintiff to present outdated financial information to the jury which understated Defendants’ wealth, thus prejudicing Plaintiff’s ability to collect an appropriate damages award.

c. The Court Already Rejected Defendants’ Argument that Plaintiff Could Not Receive Defendants’ Financial Information after the Discovery Cutoff.

Defendants’ argument that Plaintiff’s trial subpoenas were too late ignores several facts. First, Plaintiff requested the documents in discovery. Second, Plaintiff needed Defendants’ 2018 financial documents which did not exist until after the close

1 of discovery. Defendants should have produced updated financial documents pursuant
2 to the FRCP, but they refused. Thus, the trial subpoenas were proper as they sought
3 documents not in existence during the discovery period.

4 Third, and most importantly, Defendants already raised their timeliness
5 argument at the January 7, 2019 pre-trial conference. Defendants told the Court that
6 their “position is that discovery’s closed.” (Estrin Decl., Exh. WW at 27:22-23.) The
7 Court considered Defendants’ argument and correctly ruled that “I do think that they
8 have a right to know something about the present financial condition of the defendant”
9 for punitive damages. (Estrin Decl., Exh. WW at 28:5-7.) Thus, Defendants’ argument
10 that Plaintiff was too late in requesting financial information has already been rejected
11 by the Court. Defendants refused to comply with the Court’s order by providing
12 Plaintiff with only two pieces of paper about only two of the Defendants.

13 **d. Defendants Prevented Plaintiff from Meaningfully**
14 **Examining Schembari About Their Financial Condition.**

15 Finally, both of Defendants’ motions make a big deal out of nothing with respect
16 to Plaintiff’s objection to Defendants improper question to Schembari about his ability
17 to pay a judgment in the millions. (Mot. at 16:5-7.) Specifically, Defendants’ counsel
18 asked Schembari if he and his companies could pay a judgment in the “millions and
19 millions of dollars.” (Estrin Decl., Exh. D at 60:18-23.) Schembari’s answer to this
20 question would have provided no guidance to his financial condition for the purposes
21 of punitive damages. Schembari simply would have answered “no” without any
22 explanation of his company’s profits or net worth. At this point, no one even knew
23 what the judgment would be, so the question was irrelevant.

24 For similar reasons, Defendants’ argument that Plaintiff could have asked
25 Schembari questions about his financial condition is misplaced. Defendants already
26 told Plaintiff that incredibly Schembari did not have a single document showing his
27 financial condition. Thus, how would Schembari know anything about his financial
28 condition? Also, without any documents to impeach Schembari or refresh his

1 recollection, Plaintiff would have to accept anything Schembari said as true.
2 Defendants cannot refuse to produce any financial information and then claim Plaintiff
3 should have just asked the witness questions at trial as a substitute.

4 **3. The Jury Had Sufficient Evidence to Find that Defendants Acted**
5 **with Malice, Oppression, or Fraud.**

6 Defendants concede that Schembari and CDF acted with malice, oppression or
7 fraud. (Mot. at 16:12-14 only discusses ACP and Phenix Jet.) As discussed in Section
8 III(A)(2) above, the malicious and fraudulent actions of Schembari and CDF were all
9 for the benefit of Phenix Jet/ACP. Furthermore, Schembari, Quenga, and Sakurai (all
10 officers or managers of Phenix Jet) acted on behalf of Phenix Jet/ACP to interfere with
11 Jet Edge's contracts before and after Phenix Jet's incorporation. Corporations are
12 liable for punitive damages attributable to "managing agents," which are "employees
13 who exercise substantial independent authority and judgment over decisions that
14 ultimately determine corporate policy." *White v. Ultramar, Inc.*, 21 Cal. 4th 563, 573
15 (1999) (holding that the conduct of a supervisor who fired plaintiff could lead to
16 punitive damages against the company). For these reasons, and others, the jury
17 properly determined that punitive damages were appropriate against all Defendants.

18 Defendants misstate the "clear and convincing" evidence standard to require "no
19 substantial doubt" and be "sufficiently strong to command the unhesitating assent of
20 every reasonable mind" based on a quote from *In re Angelica P.*, 28 Cal. 3d 908, 919
21 (1981) which has been heavily criticized in more recent cases. (Mot. at 16:26-17:3.)
22 "Neither *In re Angelia P.*, *supra*, 28 Cal.3d 908 . . . nor any more recent authority
23 mandates that augmentation [to CACI No. 201], and ***the proposed additional***
24 ***language is dangerously similar to that describing the burden of proof in criminal***
25 ***cases.***" *Nevarrez v. San Marino Skilled Nursing & Wellness Ctr., LLC*, 221 Cal. App.
26 4th 102, 114 (2013) (emphasis added). The Court properly instructed the jury on the
27 standard for punitive damages without any objection from Defendants. (See Dkt. No
28 265 at Instruction No. 3; and Dkt. No. 296 at Jury Instruction No. 4.)

1 “Malice, oppression, or fraud” means that (i) the defendant acted with intent to
2 cause injury or knowing disregard of the rights of another, *or* (ii) that the defendant’s
3 conduct was despicable, *or* (iii) that the defendant intentionally misrepresented or
4 concealed a material fact intending to harm the plaintiff. *See* CACI No. 3947; and
5 Dkt. No. 296, Jury Instruction No. 36. The jury could determine malice from the
6 circumstantial evidence introduced. “Malice may be proved either expressly through
7 direct evidence or by implication through indirect evidence from which the jury draws
8 inferences.” *Pfeifer v. John Crane, Inc.*, 220 Cal. App. 4th 1270, 1299 (2013). In fact,
9 malice is “[m]ost often . . . proven by circumstantial evidence alone.” *Seimon v. S.*
10 *Pac. Transportation Co.*, 67 Cal. App. 3d 600, 607 (1977)

11 Defendants incorrectly argue there was “no evidence at all” of why Jet Edge’s
12 customers decided to terminate their contracts and move to ACP and Phenix Jet. (Mot.
13 at 17:20-25.) In Section III(A)(2), Plaintiff set forth some of the substantial evidence
14 presented at trial which the jury could properly rely on to find Defendants’ liable.

15 Contrary to Defendants’ assertions, their coordinated theft of Jet Edge’s
16 customers was not permissible “commercial competition.” Instead, the evidence at
17 trial, including the evidence described in Section III(A)(2), shows that Defendants
18 engaged in a year-long malicious and fraudulent scheme to steal Jet Edge’s Asian
19 clients. Defendants used Schembari’s position at Jet Edge to execute their scheme.
20 Since Schembari made disparaging comments to Jet Edge’s customers during his
21 employment with Jet Edge, the jury could infer that these malicious comments had a
22 pronounced impact on the customers’ decisions to leave. (Estrin Decl., Exhs. A, B, C,
23 and E at 58:22-25.) Further, Defendants copied and used Jet Edge’s confidential
24 information, including ACMAs, employee handbooks, and IOE training documents.
25 (Estrin Decl. E at 106:16-18, 106:21-22, 120:25-121:3; X; Y; CC; DD; EE; and FF.)
26 Furthermore, Schembari diverted N2020 away from Jet Edge’s management. (Estrin
27 Decl., Exhs. E at 102:14-22, 104:2-10; and W.) Defendants’ actions in this case are
28 very similar to the defendant’s actions in *Southern California Disinfecting Co. v.*

1 *Lomkin*, 183 Cal. App. 2d 431, 451 (1960) where the Court of Appeals affirmed an
2 award of punitive damages because the defendant executed a scheme to use
3 confidential documents to steal plaintiff's customers.

4 Even worse, Defendants executed their plan in secret to inflict maximum harm
5 on Jet Edge.⁷ After the first Jet Edge customer terminated its contract, Sakurai (Phenix
6 Jet's COO) lied to Jet Edge's CEO Bill Papariella, telling him the Asian jet owners
7 were happy, despite knowing they would all terminate their contracts with Jet Edge.
8 (Estrin Decl., Exhs. F, GG, II, JJ, KK, and MM.) Consequently, Jet Edge had no
9 opportunity to cure or mitigate its sudden loss of these customers and was forced to
10 shut down its entire operation in Asia forcing Jet Edge to layoff five percent of its work
11 force. (Estrin Decl., Exhs. H at 68:24-73:20, 73:24-74:2, 75:12-76:20; and I at 16:7-
12 17, 36:23-37:1.) Defendants contend that Sakurai's e-mail was not made on behalf of
13 the Defendants but ignore that, as discussed in Section III(A)(2), Sakurai helped
14 Schembari form Phenix Jet and was working with Phenix Jet when he sent the e-mail.⁸
15 Therefore, the jury could reasonably infer that Sakurai lied to Papariella regarding the
16 intentions of Defendants and Jet Edge's clients so that Jet Edge could not take any
17 steps to keep these jet owners as customers.

18 The jury's finding that Defendants acted with malice, oppression or fraud by
19 stealing Jet Edge's customers is supported by substantial evidence. Therefore, the
20 jury's punitive damages award should be upheld.

21 **IV. CONCLUSION**

22 For the foregoing reasons, the Court should deny Defendants' Renewed Motion
23 for Judgment as a Matter of Law and uphold the jury's verdict.

24 _____
25 ⁷ See, e.g., Estrin Decl., Exhs. A; F; J at 148:10-17, and 165:24-166:4; O; P; T at 80:15-
26 81:25, and 143:25-144:24; W; Z; and CCC.

27 ⁸ Defendants' argument that Jet Edge's customers did not move to Phenix Jet until
28 October 2016 is immaterial because they had to wait until the acquisition of ACP.
(Estrin Decl., Exh. BBB.)

1 Dated: May 2, 2019

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